TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1923

No. 819

JAMES C. DAVIS, DIRECTOR GENERAL OF RAILROADS, AS AGENT OF THE UNITED STATES, PETITIONER,

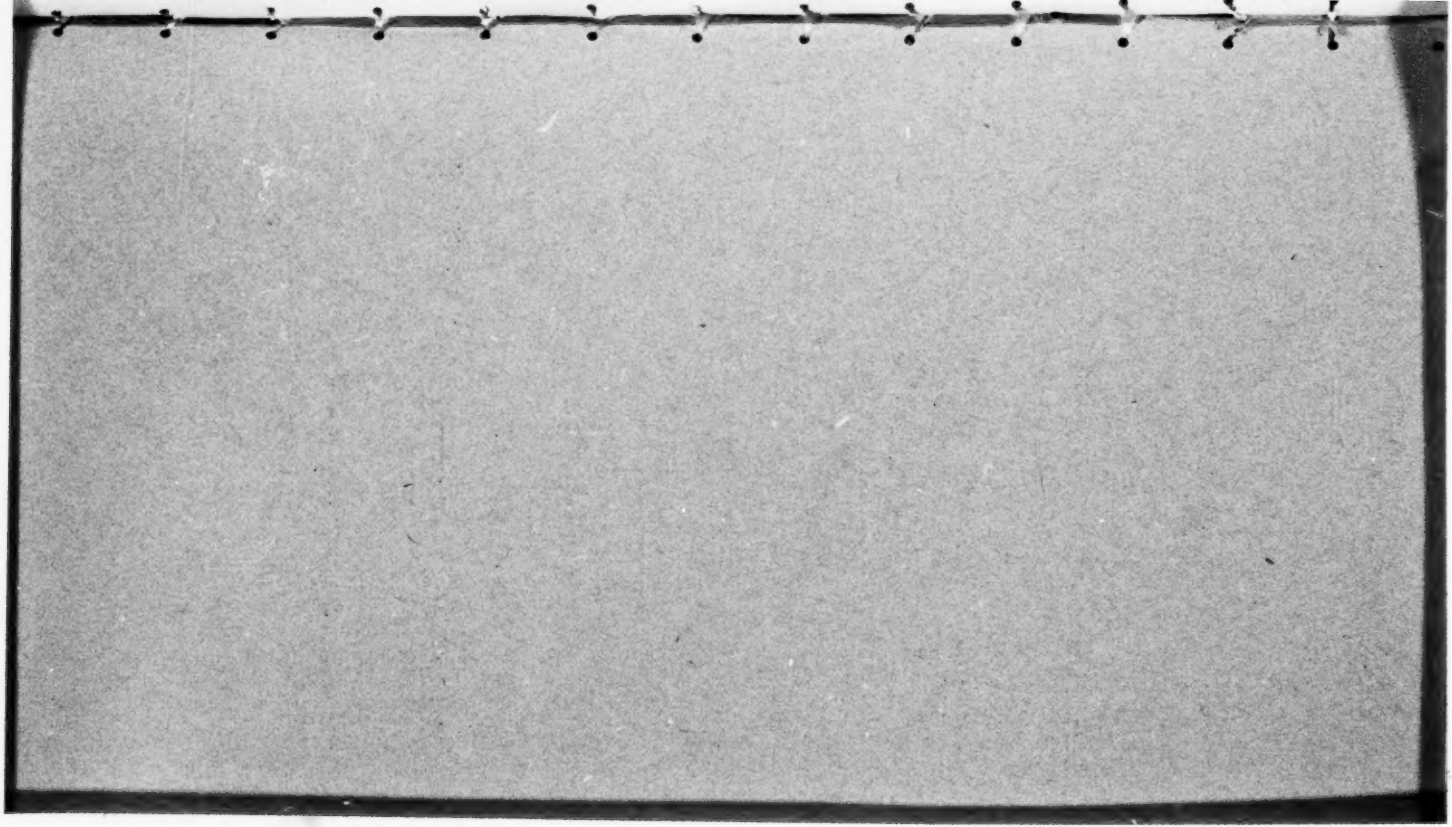
vs.

CORONA COAL COMPANY

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE PARISH OF ORLEANS OF THE STATE OF LOUISIANA

FILED FEBRUARY 16, 1924

(30,129)



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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., APRIL 24, 1924

[fol. 1] **SUPREME COURT OF THE STATE OF LOUISIANA**

No. 26343

[Caption omitted]

[fol. 2] SUPREME COURT OF THE STATE OF LOUISIANA

No. 26343

JAMES C. DAVIS, Director of Railroads, as Agent of the United States of America,

vs.

THE CORONA COAL COMPANY

PETITION FOR WRIT OF CERTIORARI OR REVIEW

To the Honorable the Supreme Court of the State of Louisiana:

The petition of James C. Davis, Director General of Railroads, as Agent of the United States of America, in the cause entitled James C. Davis, Director General of Railroads as Agent of the United States of America versus Corona Coal Company, lately pending in the Court of Appeal for the Parish of Orleans, with respect represents:

I

That the President of the United States of America, acting under and in accordance with an act of Congress entitled, "An act making appropriation for the support of the army for the fiscal year ending June 30th, 1917, and for other purposes", Approved August 29th, 1916 (39 Stat. L. 645), and an act of Congress entitled, "An act to provide for the operation of transportation systems while under federal control for the just compensation of their owners and for other purposes", Approved March 21, 1918 (40 Stat. L. 451), and by presidential proclamation dated December 26th, 1917, assumed complete control of the railroads and transportation systems throughout the continental United States and was in control of the operation of same as a common carrier for hire at all times hereinafter mentioned.

That the President of the United States, acting under and in accordance with said acts of Congress, first appointed William G. McAdoo as Director General of Railroads, then Walker D. Hines and later John Barton Payne as such. Petitioner further shows that the President of the United States, acting under and in accordance with section 206 of the Act of Congress entitled, "Transpor-

tation Act 1920" (40 Stat. L. 456), appointed said Hines, later said Payne, and now has appointed your petitioner Director General of Railroads as Agent of the United States of America for the uses and purposes therein set forth, and more particularly to bring suits and to settle any judgments or causes of action arising under the act of control of the transporation systems under the said acts to regulate [fol. 3] commerce including claims for damages to the physical property taken under control under said act.

II

That this suit was filed March 3, 1923 in the First City Court of the City of New Orleans under the above title and number 110,023 on the docket of said Court.

III

That this action is for the recovery of $201.83 (money due the United States in its sovereign capacity from the defendant company alleged by petitioner to be the amount of damages caused by defendant's tug negligently injuring a wharf on January 9th, 1920, at which time the said wharf was part of the physical property of a carrier over which the United States under the Federal Control Act had assumed complete control and operation.

Northern Pacific R. R. Co. vs. N. Dakota, 250 U. S. 135.
Section 12 Federal Control Act. (40 Stat. L. 451).

IV

That the defendant appeared in the cause and filed an exception on the ground that the cause of action is prescribed under the laws of the United States and of Louisiana, and especially under the prescription of one year and two years.

That the said City Court, through Judge Henry Benshaw, maintained the aforesaid plea and rendered judgment dismissing plaintiff's suit, whereupon petitioner appealed to the Court of Appeal for the Parish of Orleans and the cause — argued and submitted. On Ocober 1st, 1923, the Honorable Wm. A. Bell, Judge, rendered a decree affirming the judgment of the First City Court. That thereafter, within the delay allowed by the rules of the Court, an application for rehearing was made but denied by the court on October 15th, 1923.

V

That your petitioner is without any relief except that to be gained through a writ of certiorari which your petitioner desires to obtain directed to the Honorable Court of Appeal for the Parish of Orleans, solely upon the ground that the decision of the questions of law involved in said cause by the said Court of Appeal is in conflict with the jurisprudence of this Honorable Court and with the settled jurisprudence of the various State Courts, Supreme Court and other courts

of the United States, and that the judgment rendered thereunder is clearly erroneous.

[fol. 4]

VI

That petitioner gave due notice of his intention to apply for this writ by filing with the Clerk of the Court of Appeal on October 34, 1923, a written notice addressed to the Judges of the Court of Appeal, to opposing counsel, and to all other parties interested.

VII

That petitioner represents the Court of Appeal for the Parish of Orleans erred in holding the United States of America suing in its sovereign capacity in a judicial tribunal of this state is amenable to a state statute of limitation without having consented through congress to be bound by such a statute.

1. In the control and operation of the railroads under the war power, the government was exercising a soveign power and acting in its capacity as sovereign.

Northern Pacific R. R. Co. vs. N. Dakota 250 U. S. 135.
Missouri Pacific R. R. Co. vs. Ault. 256 U. S. 554.
Section 12 of the Federal Control Act. (40 Stat. L. 451).

2. "The United States, asserting rights vested in them as a sovereign government are not bound by any statutes of limitations, unless Congress has clearly manifested its intention that they should be so bound".

United States vs. N. C. & St. L. Ry. Co. 118 U. S. 120, 125.
Hays vs. United States 175 U. S. 248,260.

and in United States vs. Thompson, 98 U. S. 486, 488, the Court said: "* * * a state statute cannot bar the United States. The same doctrine has been several times laid down by this Court; but it seems always to have been taken for granted, and in no instance to have been discussed by counsel, or the Court. United States v. Buford, 3 Pet. 12; Lindsey v. Miller's Lessee 6 ed. 666; Gibson vs. Chouteau, 13 Wall 92".

United States vs. Nashville etc. Ry. Co. 118 U. S. 120.
United States vs. Whited & Wheless 246 U. S. 552, 561.
Ches. & Delaware Canal Co. vs. U. S. 250 U. S. 123, 125.
Pepper v. Dunlap, 9 Rob. 283, 288.
New Orleans v. Salmon Brick etc. Co. 135 La. 828.
Haggerty v. Annison, 133 La. 338, 342, 343.

[fol. 5] 3. An exception to the foregoing rule is, "although a government when enforcing rights arising out of the exercise of its sovereign powers is not ordinarily treated as within statutes of limitation applicable to other litigants, yet it may be so included if it consent to such inclusion."

Davis, Director General of Railroads, etc. vs. E. I. Dupont de Nemours & Co., 287 Fed. 522, 523.

and in such cases it must clearly appear that such inclusion was intended.

Hays v. United States, 175 U. S. 248, 20 Sup. Ct. 80-44 L. Ed. 150. Gibson v. Chouteau, 13 Wall 92, 20 L. Ed. 534. Chi. & N. W. Ry. Co. vs. Zebarth, 245 Fed. 334, 337, 157 CCA 526.

VIII

That your petitioner represents that the Honorable Court of Appeal erred in holding that as to suits and actions by the government brought after the termination of the period of Federal Control (March 1, 1920) the sovereign immunity from statutes of limitation was waived through the following or any other acts of Congress:

(a) Section 10 of the Federal Control Act (40 Stat. L. 451). This Section makes carriers subject to state and federal laws "while under Federal Control" and provides that in actions or suits "against" the carrier no defense as to governmental agency shall be made.

As the action at bar is brought by the government after the termination of Federal Control the section has no present application.

Section 16 of the Federal Control Act, which must be read in connection with Section 10, declares this Act to be emergency legislation enacted to meet conditions growing out of war and asserts that the future policy of the Federal Government was not to be expressed or prejudiced thereby.

(b) Section 206 (a) of the Transportation Act of 1920 (41 Stat. L. 461), became effective March 1, 1920 and applies to causes of action arising out of Federal Control, but fixes only a limitation on suits, etc. brought against the agent designated by the President and has no reference to limitations on suits brought by the government for the recovery of moneys that accrued during Federal Control.

(c) Section 202 of the Transportation Act 1920, (41 Stat. L. 459), provides that the President shall, as soon as practicable, after [fol. 6] the termination of Federal Control, settle matters disputes, etc., of whatsoever nature arising out of Federal Control, and would seem to indicate that Congress was to allow the President discretion as to the period of time within which to bring to a conclusion certain disputes, and it might well be argued that your petitioner's action comes within the meaning of this section.

(d) Section 424 of the Transportation Act 1920 (41 Stat. L. 492) is incorporated in Section 16, Paragraph 3 of the Act to Regulate Commerce as amended.

1. The learned Judge of the Court of Appeal held that the language of this Section providing the following limitation:

"All actions at law by carriers subject to this act for recovery of freight charges, or any part thereof shall be begun within three years from the time the cause of action accrued, and not after",

completely destroyed the contention that Congress had not waived its sovereign immunity. There is nothing in the language of this section that would cause it to operate against the government, and this was the ruling of the United States Circuit Court of Appeal in a recent decision.

Davis D. G. Etc. vs. Dupont de Nemours (287 Fed. 522).

The Court of Appeal should have followed this decision construing a Federal Statute rather than overrule.

IX

That your petitioner represents that the Honorable Court of Appeal erred in declining to follow the decisions of the United States Court upon the Federal issues involved.

Bracey vs. Calderwood, 36 Ann. 797. McKenzie vs. Bacon 38 Ann. 475. Hobson v. Peake. 44 Ann. 387, 388. State vs. Ardoin, 51 Ann. 169.

7. Ruling Case Law "Courts" p. 1013, Sec. 39, where it is held:

"that where a suit in the state court involves a question arising under the constitution, laws or treaties of the United States, or, in other words, what is commonly called a "federal question", a decision of the United States Supreme Court upon the point at issue is to be regarded as absolutely "binding and authoritative" . . . ." and cases cited under note 1 p. 1014.

X

That petitioner annexes hereto the affidavit required by Rule XVI of this Honorable Court, an assignment of the errors complained of, and certified copies of the original position and answer and other [fol.] pleadings material to a decision upon this writ, of the reasons assigned by the Court of Appeal for its judgment, of the petition for rehearing, of the brief filed by petitioner in the Court of Appeal, and of the judgment refusing the rehearing.

Wherefore, The premises considered, petitioner prays that a writ of certiorari do issue herein, directing the Honorable the Court of Appeal for the Parish of Orleans to send up to Your Honors the record in the case aforesaid, to the end that same may be examined by this Court, and that your Honors may either remand the case to the Court of Appeal, with instructions, or take the whole case, as by the Constitution authorized and pronounce judgment therein, and that your Honors may hold that the decisions and questions of law involved in said cause, as decided by said Court of Appeal for the Parish of Orleans are in conflict with the jurisprudence of the Honorable Court and the Supreme Court of the United States; that the judgment of the Court of Appeal for the Parish of Orleans be

avoided and reversed and judgment rendered in favor of petitioner overruling the plea of prescription herein filed, and for general relief.

(sg.) Deregre, Levy & Chaffe, Edward L. Gladney, Jr., Attys. for Applicant.

Jurat showing the foregoing was duly sworn to by Edward L. Gladney, Jr. Omitted in printing.

[fol. 8] Jurat showing the foregoing was duly sworn to by R. C. Watkins. Omitted in printing.

[fol. 9] STATE OF LOUISIANA,
Parish of Orleans:

Before me, the undersigned authority, personally came and appeared Edward L. Gladney, Jr. who, being sworn, deposes and says:

That he is attorney for the plaintiff and appellant in the above entitled and numbered cause and the petitioner named in the foregoing petition and that notification, in accordance with Rule XVI of this court, was given of the intention to apply to this Court for a writ of certiorari in this cause, same being addressed to the attorneys for the defendant and appellee, and deposited in the office of the Clerk of the Court of Appeal for the Parish of Orleans, in the words and figures following, to wit:

STATE OF LOUISIANA:

COURT OF APPEAL FOR THE PARISH OF ORLEANS

No. 9174

In re

JAMES C. DAVIS, Director General of Railroads, as Agent of the United States of America,

vs.

CORONA COAL COMPANY

To the Honorable Judges of the Court of Appeal; to Mr. Richard B. Montgomery, attorney representing defendant in the above entitled and numbered cause, and all other parties interested, through the Clerk of the Court of Appeal:

You are hereby notified that on behalf of the plaintiff and appellant in the above mentioned cause, I shall apply to the Honorable the Supreme Court of the State of Louisiana for a writ of certiorari

to review the final decree of the Court of Appeal for the Parish of Orleans in this cause.

New Orleans, the 25th day of October, in the year 1923.

(Signed) Denegre, Leovy & Chaffe, Edward L. Gladney, Jr., Attorneys for Plaintiff. (Sg.) Edward L. Gladney, Jr.

Sworn to and subscribed before me this 14 day of November, 1923. (Sg.) Max M. Schaumberger.

[fol. 10] SUPREME COURT OF THE STATE OF LOUISIANA

[Title omitted]

ASSIGNMENT OF ERRORS

James C. Davis, plaintiff and appellant, in connection with his petition for a writ of certiorari, makes the following assignment of errors, which he avers, are to be found in the opinion, judgment and decree of the Honorable Court of Appeal for the Parish of Orleans:

1st. That the Court erred in holding that plaintiff's sovereign immunities are limited by statutes of limitation either state or federal.

2nd. That the Court erred in its interpretations placed upon the following portions of the United States statutes insofar as the interpretation shows a waiver of sovereign immunity from statutes of limitation:

(a) Section 10 of the Federal Control Act (40 Stat. L. 451).

(b) Section 206 of the Transportation Act of 1920 (41 Stat. L. 461).

(c) Section 424 of the Transportation Act of 1920. (41 Stat. L. 492), this being Section 16, Paragraph 3 of the Act to Regulate Commerce as amended.

3rd. That the Court erred in declining to follow the interpretation placed upon the federal statutes and federal questions herein involved by the United States Courts.

4th. That the Court erred in rendering a decree and entering a judgment herein in favor of defendant and against plaintiff.

(Sg.) Denegre, Leovy & Chaffe, Edw. L. Gladney, Jr., Attorneys for Plaintiff.

[fol. 11] SUPREME COURT OF THE STATE OF LOUISIANA

ACTION OF COURT REFUSING WRITS

New Orleans, November 17th, 1923.

By Justice OVERTON:

Refused on the ground that the ruling of the Court of Appeal is correct.

(Signed) W. O., C. A. O'N., B. C. D., H. F. B., P. L., D. N. T.

Land, J., Dissents.

Rogers, J., Dissents.

St. Paul, J., concurs in refusal on ground that matter presents nothing requiring exercise of extraordinary jurisdiction of this court.

[fol. 12] SUPREME COURT OF THE STATE OF LOUISIANA

CLERK'S CERTIFICATE

I, Paul E. Mortimer, Clerk of the Supreme Court of the State of Louisiana, do hereby certify that the foregoing nine (9) pages are a true copy of the application for certiorari, or writ of review, to the Court of Appeal, Parish of Orleans, State of Louisiana, filed in this Court on the 14th day of November, 1923, in which James C. Davis, Director General of Railroads, as agent of the United States of America, was the plaintiff, and The Corona Coal Company, was the defendant, and in which James C. Davis, Director General of Railroads, as Agent of the United States of America, was the applicant for the writ of certiorari, which said writ of certiorari, or review, was refused by this Court on the 17th day of November, 1923, as will appear from action of the Court to be found upon page ten hereof.

In testimony whereof, I hereunto sign my name and affix the seal of the Court aforesaid, at the city of New Orleans, this the 8th day of February, Anno Domini, one thousand, nine hundred and twenty-four.

Paul E. Mortimer, Clerk Supreme Court of Louisiana. [Seal of Supreme Court of the State of Louisiana.]

[fol. 13] First City Court of New Orleans, Division "C"

[Title omitted]

Petition

To the Honorable the First City Court in and for the City of New Orleans:

The petition of James C. Davis, Director General of Railroads, as Agent of the United States of America, with respect represents:

I

That the President of the United States of America, acting under and in accordance with an act of Congress entitled, "An Act making appropriation for the support of the army for the fiscal year ending June 30, 1917, and for other purposes," approved August 29, 1916; and an act of Congress entitled, "An act to provide for the operation of transportation systems while under federal control, for the just compensation of their owners, and for other purposes," approved March 21, 1918, and by proclamation dated December 26th, 1917, assumed complete control of all the physical properties of the railroads and transportation systems throughout the Continental United States, and was in control of the operation of same as a common carrier for hire at all times hereinafter mentioned.

II

That the President of the United States acting under and in accordance with said acts of Congress, first appointed William G. McAdoo as Director General of Railroads, then Walker D. Hines, and later John Barton Payne as such. Petitioner further shows that the President of the United States, acting under and in accordance with Section 206 of the Act of Congress entitled "Transportation Act 1920," appointed said Hines, later said Payne, and has now [fol. 14] *has* appointed your petitioner Director General of Railroads, as Agent of the United States of America, for the purposes therein set forth, charged with the duty of collecting any sums or amounts thereunder due the United States of America and more particularly to bring suits and to settle any judgment or causes of action arising under the act of control of the transportation systems under the said acts to regulate Commerce, including claims for damages to the physical properties taken under control under said act.

III

That on or about January 9, 1920, a certain wharf on the west bank of the Mississippi River situate on or adjacent to that porton of the City of New Orleans known as Algiers, was under the control of the United States of America, acting through the Director General of

Railroads as aforesaid, the wharf being the property of Morgans Louisiana & Texas Railroads & Steamship Company, a common carrier of freight and passengers for hire whose railroad system (including the said wharf) was during Federal Control, operated by the Director General of Railroads as aforesaid.

IV

That the Corona Coal Company is a legal corporation authorized to do business in the State of Louisiana, and having an agent for process of services in the City of New Orleans.

V

That by virtue of a consolidation and merger between the Corona Coal Company and the River and Ocean Towing Company, under the name of "Corona Coal Company," the said Corona Coal Company assumed and became legally liable for the debts and obligations of the River and Ocean Towing Company.

[fol. 15]

VI

That the Corona Coal Company is justly and truly indebted unto your petitioner in the full sum of Two hundred and one and 83/100 dollars ($201.83), with legal interest thereon for this to wit;

VII

That on or about January 9th, 1920, the tug boat "W. G. Wilmot" was owned, operated and controlled by the aforesaid River & Ocean Towing Company.

VIII

That on or about the above mentioned date the "W. G. Wilmot" then and there operated, managed and controlled by its officers and crew, the agents of the River & Ocean Towing Company, ran into said wharf with such headway and force that the pilings and timbers thereof were so damaged that it became necessary for the United States Government to repair the said wharf at an expense of two hundred and one 83/100 dollars ($201.83). Your petitioner annexes hereto an itemized statement of the labor and material required to repair and render safe and useful the said wharf.

IX

That the said accident was caused solely by the lack of care, want of skill and the negligence of the officers and crew of the "W. G. Wilmot," the agents of the said River and Ocean Towing Company, in attempting to land at said wharf with excessive headway.

X

That the said wharf was sufficiently strong and constructed of such material and piling to withstand any ordinary use.

[fol. 16] Wherefore, your petitioner prays that the said Corona Coal Company, defendant herein be cited to appear and answer the aforesaid petition, and that after due proceedings had there be judgment in favor of James C. Davis, Director of Railroads, as Agent of the United States of America, against the said Corona Coal Company in the sum of two hundred and one and 83/100 dollars with legal interest thereon from judicial demand, until paid, and costs.

And for all general and equitable relief.

(Signed) Denegre, Leovy & Chaffe, Edward L. Gladney.

Jurat showing the foregoing was duly sworn to by E. L. Gladney, Jr., omitted in printing.

A true copy. H. J. Stansbury, Dy. Clerk.

[fol. 17] First City Court of New Orleans, Division "C"

[Title omitted]

Summons and Return

To Corona Coal Co., New Orleans, La.:

You are hereby summoned to comply with the demand contained in the petition of which copy accompanies this *ciatatio*, or deliver your answer to the same, in the office of the Clerk of the First City Court of the City of New Orleans, within three days after the service thereof, etc.

Witness the Honorable Leon L. Labatt, Val J. Stentz, Henry Renshaw, Judges of the said Court this 3rd day of March in the year of our Lord, 1923.

(Signed) John Blank, Dy. Clerk.

On the 5th. day of March 1923 served copy of the within Citation and accompanying petition on Corona Coal Company, through Elmer E. Wood, Agent for defendant herein, by leaving the same at its office 1233 Whitney Building, in the hands of F. J. Gauche, Asst. Mgr. a person apparently the age of 18 years, living and residing in the said domicile whose name and other facts connected with this service, I leave by interrogating the said F. J. Gauche, Asst. Mgr. of the said Elmer E. Wood its Agent being absent from his office Deputy Sheriff.

(Signed) A. J. Hymel, Deputy Sheriff, Parish of Orleans.

A true Copy. H. J. Stansbury, Dy. Clerk.
New Orleans, La. Feby. 4th. 1924.

[fol. 18] FIRST CITY COURT OF NEW ORLEANS

[Title omitted]

EXCEPTIONS

To the Honorable the First City Court in and for the Parish of Orleans:

Now into court comes the Corona Coal Company, made defendant herein, and without waiver of its rights excepts on the ground that the cause of action is prescribed under the laws of the United States and of Louisiana, and especially under the prescription of on and two years.

Wherefore, respondent prays that the suit be dismissed at plaintiff's cost. And for all general relief.

(Signed) R. B. Montgomery, Wm. H. McClendon, Jr.

IN FIRST CITY COURT OF NEW ORLEANS

ANSWER

Now into this Court comes the Corona Coal Company, reserving all its rights to its above exception, and answering simply and solely because it is forced to file its exceptions and answer together under the rules of the Court, and alleges as follows:

First. In answer to Article One, respondent does not know of its own knowledge that these allegations apply to the within matter and therefore denies same and calls for strict proof of same.

Second. In answer to Article Two, respondent does not know of its own knowledge that these allegations apply to the within matter and therefore denies same and calls for strict proof of the same.

Third. In answer to Article Three, respondent does not know of his own knowledge that these allegations apply to the within matter and therefore denies same and calls for strict proof of the same.

[fol. 19] Fourth. Respondent admits the allegations of Article Four.

Fifth. Respondent admits that insofar as this cause of action in this suit is concerned, if there is any cause of action, the Corona Coal Company is responsible in place of the River and Ocean Towing Company, but respondent does not fully understand the implications made by the other allegations and therefore denies same.

Sixth. Respondent denies the allegations of Article Six.

Seventh. Respondent admits the allegations of Article Seven.

Eight. Respondent denies the allegations of Article Eight.

Nine. Respondent denies the allegations of Article Nine.

Tenth: Respondent denies the allegations of Article Ten.

Eleventh. Further answering, respondent alleges that on or about January 9, 1920, it was invited and ordered to remove a ship from an old wharf supposed to belong to the Morgan's Louisiana & Texas Railroad and Steamship Company, which said ship had been invited and was moored at said wharf; that said tug did move said ship in the only proper and usual way; that it was guilty of no negligence in moving said ship and did nothing that could have hurt said wharf and did not hurt said wharf ;that if said wharf was affected in any way by the moving out of said ship, it was due to the rotteness of said wharf and not to the negligence or improper moving of said ship; that in inviting said ship to moor at said wharf in holding said wharf out as a proper wharf for mooring ships and in inviting said tug to move said ships, said Government was hold-
[fol. 20] ing said wharf out as a strong and proper and reasonable wharf for the purpose of loading and unloading and moving ships, that if said wharf was in the proper condition for its uses it could not possibly have been hurt, and that if it was hurt, it was the fault of the owners of said wharf and the plaintiffs in this suit, if owners, that said wharf could not stand the uses to which said owners had put said wharf.

Wherefore, respondent prays that its exceptions be maintained and that it if be over ruled and reserving all its rights thereto, it prays for judgment in its favor and dismissing the suit with costs. And for all general relief.

Jurat showing the foregoing was duly sworn to by Elmer E. Wood and R. B. Montgomery omitted in printing.

(Signed) Robert B. Montgomery, Wm. H. McClendon, Attys.

[fol. 21] First City Court, Parish of Orleans, Division "C"

[Title omitted]

Exhibit in Evidence.

Department No. Not #184.
Address, Board of Trade Bldg., New Orleans, La.
Registered in October, 1921.

New Orleans, La. October 26th, 1921.

River & Ocean Towing Company to Morgans Louisiana & Texas Railroad, Dr.

Make checks payable to above named company, and address all remittances to Treasurer, New Orleans, La.

For labor and material expended repairing damage to our Algiers Wharf which were incurred Jan. 9th. 1920 at 6:10 A. M. when your Tug W. G. Wilmot while coming in to remove S. S. Marianna, as follows:

Labor: Driving Piles, Pile Driver Rental, and fuel Material		$116.69
2 Pieces, S. H. Lumber 10 x 12 A. 765 each	1.53	
3 Green Hewn piles 60 feet each 27.60 ea.	82.80	
3 Draft Bolts 3/4 x 20 A. 07 each	.21	
10 #Nails a. .06 lb.	.60	85.14
		201.83

A true copy. H. J. Stansbury, Dy. Clk. (Seal of Court of Appeals for the Parish of Orleans.)

New Orleans, Feby. 2/24.

[fol. 22] First City Court, Parish of Orleans, Division "C"

[Title omitted]

Judgment

In this case submitted to the Court on the exception of prescription and taken under advisement, the Court considering the State prescription of one year herein pleaded to be well taken; and for the reasons set forth in this Court's written opinion on file in the suit of James C. Davis, Director General of Railroads, vs. W. B. Thompson doing business as W. B. Thompson Company, No. 107791 of this Court, maintains said State prescription of One year accordingly. It is ordered, adjudged, and decreed that this suit be dismissed at the costs of the plaintiff herein.

Judgment rendered May 21st. 1923.

Judgment signed May 21st. 1923.

(Signed) Hey Renshaw, Judge.

A true copy. H. J. Stansbury, Dy. Clerk. (Seal of Court of Appeals for the Parish of Orleans.)

New Orleans, La., February 4. 1924.

[fol. 23] First City Court, Parish of New Orleans, Division "C"

[Title omitted]

Reasons for Judgment on Exception of Prescription

By His Honor Hey Renshaw:

In bar of this suit, defendant pleads the prescription of two years. The prescription relied on is that provided by Act 223 of the General Assembly of Louisiana of 1914.

It is argued that this is a suit by the United States Government on a claim due the Government and that, therefore, no prescription applies; that if any prescription be applicable it is prescription allowed by Federal Statute, and not the prescription provided by State law.

By Sec. 10 of the Federal Control Act it is enacted; "That carriers while under Federal control shall be subject to all laws and liabilities as common carriers, whether arising under State or Federal laws or at common law, except insofar as may be inconsistent with the provisions of this Act or any other Act applicable to such Federal control or with any order of the President. Actions at law or suits in equity may be brought by and against such carriers and judgments rendered as now provided by law; and in any action at law or suit in equity against the carrier, no defense shall be made thereto upon the ground that the carrier is an instrumentality or agency of the Federal Government."

Section 424 of the Transportation Act contains this language; "All actions at law by carriers subject to this Act for recovery of their charges, or any part thereof, shall be begun within three years from the time the cause of action accrues, and not after."

[fol. 24] It is evident from the language of these sections of the Statutes that the Federal Government waived the imprescriptibility now asserted. Contention is made that as the Federal Government or its representative, the Director General, is not mentioned in the prescription provisions of the section cited from the Transportation Act, the Federal Government or its representative, the Director General, is not bound thereby.

The comprehensive significance of the word "carrier" as recognized by the United States Supreme Court in the case of Missouri Pac. R. R. Co. et al. vs. Ault, 256 U. S., p. 554 et seq., attaches to the word "carriers" as used in the section cited from Transportation Act. The plea of imprescriptibility is inapplicable.

The remaining question is, which prescription, Federal or State, is to control. The power granted to Congress by the Federal Constitution to regulate commerce among the several States, is not a power to regulate the courts of the several States, Congress may give its directions to Courts of its own creation, but when the Federal Government, through its representatives, voluntarily invokes the aid of the State Court, the State law, as to prescription, prevails.

The exception that the claim herein is prescribed by the State Statute should be maintained.

(Signed) Hey Renshaw, Judge.

May 18th, 1923.

A true copy. H. J. Stansbury, Dy. Clerk. (Seal of Court of Appeals for the Parish of Orleans, District of Louisiana.)

New Orleans, La., February 4th, 1924.

[fol. 25] First City Court of New Orleans, Division "C"

[Title omitted]

Petition and Order of Appeal from Judgment to Court of Appeal, State of Louisiana

To the Honorable the First City Court in and for the Parish of Orleans:

On motion of James C. Davis, Director General of Railroads, as Agent of the United States of America, plaintiff herein, through his attorneys, Denegre, Leovy & Chaffe and Edward L. Gladney, Jr. and on suggesting to the Court that plaintiff is aggrieved by the judgment herein rendered on the Twenty-first day of May, 1923, in favor of Corona Coal Company, defendant; that the said judgment is contrary to the law and the evidence and that mover desires to appeal devolutively therefrom to the Court of Appeal for the Parish of Orleans;

It is ordered that a devolutive appeal be granted to the said James C. Davis, Director General of Railroads, as agent of the United States of America, returnable to the Court of Appeal for the Parish of Orleans on the 1st day of June, 1923, upon said party furnishing bond with good and solvent security in the sum of twenty five dollars.

(Signed) Hey Renshaw, Judge.

New Orleans, May 22nd, 1923.

A true copy. H. J. Stansbury, Dy. Clerk. (Seal of Court of Appeals for the Parish of Orleans, District of Louisiana.)

New Orleans, La., February 4th, 1924.

[fol. 26] State of Louisiana Court of Appeal, Parish of Orleans

[Title omitted]

Per Curiam Opinion

Syllabus

Limitations of actions are governed by the law of the forum.

Where a Federal statute is in conflict with a State statute on a question of limitations of actions, and the issue is before the State court, the State statute must prevail.

(Pearl Wight v. Zemurray, No. 8057, Orleans Appeal.)

For the reasons this day assigned by the Court sitting en banc in the case of James C. Davis, Director General of Railroads, as Agent of the United States of America, v. W. B. Thompson, doing business as W. B. Thompson & Company, the judgment herein appealed from is affirmed at plaintiff's costs in both courts.

New Orleans, La., October 1st, 1923.

ORDER DENYING REHEARING

On Application for New Trial

Rehearing refused, October 15th, 1923.

A true copy. H. J. Stansbury, Dy. Clerk. (Seal of Court of Appeals for the Parish of Orleans.

New Orleans, La., February 4, 1924.

[fol. 27] STATE OF LOUISIANA COURT OF APPEAL, PARISH OF ORLEANS

No. 9173

JAMES C. DAVIS, Director General of Railroads, as Agent of the United States of America

vs.

W. B. THOMPSON & COMPANY

OPINION REFERRED TO

Syllabus

Limitations of actions are governed by the law of the forum.

Where a Federal statute is in conflict with a State statute on a question of limitations of actions, and the issue is before the State Court, the State statute must prevail.

Pearl Wight vs. Zemurray, No. 8057 Orleans Appeal.

Judgment Affirmed.

Opinion

By His Honor WILLIAM A. BELL:

This is an action arising from erroneous freight charges, and is brought by James C. Davis, Director General of Railroads, to re-

cover charges in the amount of $51.84 on a car load of staves shipped in December, 1919, from Deer Siding, Alabama. The consignment was to the defendant at New Orleans. It is admitted that the shipment moved during "Federal Control" and was interstate in character. Suit was brought in November, 1922, more than two, and slightly less than, three years after date of shipment. The only serious defense to the suit is upon the plea of prescription or limitation of action found in the Statute of Louisiana, Act 223 of 1914, reading as follows:

"Act No. 223 of 1914

To Fix the Prescription of Actions Against the Common Carriers Arising from Erroneous Freight Charges and Loss and Damage to Freight.

Section 1. Be it enacted, etc., That all actions by or against common carriers for the collection or recovery of erroneous freight charges, and all actions for loss or damage to shipments of freight, shall be prescribed by two years, said prescription to run from date of shipment."

[fol. 28] The appeal is from a judgment maintaining the plea of prescription and dismissing plaintiff's action.

It is argued by counsel for plaintiff (1) that a suit by the director general for the recovery of monies derived from Federal Control is an action by the United States suing in its sovereign capacity; (2) that unless the United States, through the Congress, consents to a statute of limitation, it is not affected by such a statute; (3) that the United States has not in this instance given such consent. It is finally contended, in the alternative, that even if such consent had been given, that the Act 223 of 1914 is not controlling as against the United States, and that if the Government is amenable to any statute of limitation of actions of this nature, it is only subject to the provisions of Section 424 of the Transportation Act of 1920 (41 Stat. L. 492), restricting the time in which suit may be filed to three years and not two years as provided under the State statute. The Federal statutes, Sec. 424, is an amendment to the Interstate Commerce Act and reads in part as follows:

"* * * all actions at law by carriers subject to this Act for recovery of freight charges, or any part thereof, shall be begun within three years from the time the cause of action accrued, and not after."

It is not disputed, nor is there room for doubt, under the ruling in Northern Pacific Railroad Co. v. North Dakota, ex rel. Langer (250 U. S., 135), that a suit by the Director General for the recovery of monies derived from the Federal Control is an action by the United States in its sovereign capacity.

All other points of contention raised by the plaintiff are resolved into the dominant question whether the Federal Government when

choosing the State, rather than the Federal Court, in which to litigate its rights, is amenable to State statute, barring only the remedy and [fol. 29] not destroying the cause or right of action. See the case of Pearl Wight v. Zemurray, No. 8057, Orleans Appeal, rendered Nov. 14 1921 Campbell v. City of Haverhill, 155 U. S. 610—Angell on Limitations, 6th Ed., p. 56 et seq.

It is manifestly unsound for plaintiff to contend, as was recently held in Davis v. Dupont De Nemours (287 Fed. 522), that the Federal Government in exercising its sovereign power under the Transportation Act has not clearly given its consent to be included or treated as within the statutes of limitation of action applicable to other litigants. The language of Sec. 424 of the Act (41 Stat. L. 492), as above quoted, in our opinion, completely destroys such contention, we are unable to subscribe to the conclusions found in Davis v. Dupont, especially in the light of the broad meaning given to the term "carriers" as expounded in Missouri Pac. R. R. Co. et al. v. Ault (256 U. S. 554), and cited in the reasons for judgment of the learned judge from whose court this appeal is taken. It is an inevitable conclusion that an action of this nature if brought in the Federal Courts would involve estoppel against the Government's denial, even in its most sovereign aspect, of intention, under Sec. 424 to be amenable to the limitations of action therein expressly provided. Were the present litigants before the Federal Court in this matter, it might be properly contended, under highest Federal authority, that there is no bar to the action brought within three years and that the State statute (Act 223 of 1914) is suspended by the Federal Act, and hence altogether unavailable as a defense to the defendant in this case if before the Federal Tribunal.

In the case of United States v. Hoar, 2 Maaon (Cir. Ct.) 312, where an administrator of an estate pleaded the statute of limitation of Massachusetts in bar of an action in assumpsit brough by the United States for money had and received, the Court, through Justice Story, held the plea not good as against the Government when urged in the [fol. 30] Federal Court. It was there said:

"The only point, which has been argued here, is whether the United States are barred of their suit by the statutes of limitation of Massachusetts above pleaded. It has not been denied, and indeed is too plain for argument, that the statutes of limitation of Massachusetts cannot Proprio vigore bind or bar the statutes of the National Government. If such an effect can only be by reason of some extension of time for this purpose by the National Legislature."

In Ches. & Del. Canal Co. v. U. S. (250 U. S., 123), Mr. Justice Clarke stated the rule to be:

"That the United States is not bound by State statutes of limitation is settled with equal definiteness in U. S. v. N. C. & St. L. Ry. Co., 118 U. S., 120; U. S. v. Whited & Wheles, 246 U. S., 552, 561."

Although by the foregoing and like authorities we find this doctrine plead with almost perfect uniformity, it should be noted that the

rule announced only in its application to Federal suits in Federa Courts. We feel justified in holding that this rule cannot bind th State Courts where the lex fori prevails and should prevail, particu larly against a litigant having a choice of forums, and where the ple of prescription in whatever form it may be urged, affects only th remedy and not the right of the litigants. (25 Cyc. 1008, also 1018.

We are entirely in accord with defendant's contention that th Congress clearly intended to subject the Government while in contr of common carriers under this emergency litigation, to State laws an liabilities not inconsistent with Federal Control. This is too plainl set out in the Federal Control Act (40 Stat. L. 451) to require judicia interpretation. Section 10 of that Act reads as follows:

"By Sec. 10 of the Federal Control Act it is enacted; That carrie while under the Federal control, shall be subject to all laws and li bilities as common carriers, whether arising under State or Federa laws or at common law, except in so far as may be inconsistent wit the provisions of this Act or any other Act applicable to such Fe eral control or with any order of the President. Actions at law [fol. 31] suits in equity may be brought by and against such carrie and judgments rendered as now provided by law; and in any action law or suit in equity against the carrier, no defense shall be mad thereto upon the ground that the carrier is an instrumentality agency of the Federal Government."

The last clause of the foregoing section taken with that whic precedes it, clearly pronounces against such argument as is herei advanced to the effect that the carrier is an instrumentality or agenc of the Federal Government, against which statutes of limitatio particularly those of the State, shall not apply.

Sec. 206 of the Transportation Act provides for limitations actions brought against carriers on citation of an agent designated b the President, and that the period of limitation prescribed by eith State or Federal statutes (not exceeding however, two years from th date of passage of the Act) may be brought in any court which b for Federal Control would have ordinarily had jurisdiction. A lik provision under Sec. 424 is made for all actions at law by carrie while subject to the Transportation Act for recovery of their charge within prescriptive period of three years from the time the actio accrues. These two sections, therefore, plainly evidence the i tention of Congress that the Federal Government while represen ing all carriers, within the purview of the Transportation Act, to be protected while defending timely action, or barred whi prosecuting untimely actions, in State and Federal Courts arisi from and after the termination of Federal control.

We find no merit in plaintiff's contention that Sec. 10 of t Federal Control Act was expressly repealed by the Transportatio Act of March 1, 1920 (41 Stat. L. 456). While Sec. 200 (a) of t latter Act provides that Federal Control shall terminate at 12:01 M. March 1, 1920, it is also stipulated in Sec. 202 of the same A that:

[fol. 32] "The President, shall as soon as practicable, adjust, settle, liquidate and wind up * * * all questions and disputes of whatever nature arising out of or incidental to Federal Control."

To charge the President or his appointed agent with the duty of liquidating all matters arising from Federal Control and to provide at the same time, that in the subsequent prosecution of this duty the Government, its President or Agent, shall be given greater rights or remedies than those existing during the Federal Control, would be a denial of rights expressly reserved to all parties within the purview of the previous Act.

We find no error in the judgment of the trial court, and same is, therefore, affirmed at plaintiff's costs in both courts.

Judgment affirmed.

New Orleans, La., October 1, 1923.

ORDER DENYING REHEARING

On Application for New Trial

Rehearing refused, October 15th, 1923.

A true copy. H. J. Stansbury, Dy. Ck. (Seal of Court of Appeals of the Parish of Orleans, State of Louisiana.)
New Orleans, La., Feby. 4/24.

[fol. 33] COURT OF APPEAL, PARISH OF ORLEANS

[Title omitted]

PETITION FOR REHEARING

Petition of James C. Davis, Director General of Railroads, As Agent of the United States, plaintiff and appellant, respectfully represents:

That the opinion and decree rendered in this cause on Monday, October 1st, 1923, is erroneous and contrary to the law and evidence, and prejudicial to the interest of petitioner, and that a rehearing should be granted in this matter, for the following reasons:

I

The court erred in affirming the judgment of the First City Court.

II

The court erred in holding that plaintiff's sovereign immunities are limited by statutes of limitation either state or federal.

III

The court erred in its interpretation placed upon following portions of the United States statutes insofar as the interpretation shows a waiver of sovereign immunity from the statutes of limitation.

(a) Section 10 in the Federal Control Act (40 Statu. L. 451).

(b) Section 206 of the Transportation Act of 1920 (41 Statu. L. 461).

(c) Section 424 of the Transportation Act of 1920 (41 Statu. L. 492), this being Section 16, Paragraph 3 of the Act to Regulate Commerce as amended.

IV

The court erred in basing a portion of its decision on the case of White vs. Zemurray, #8057 Court of Appeal, as the facts of this case do not disclose an interstate shipment and therefore there was no federal question involved.

V

The court erred in declining to follow interpretation placed upon [fol. 34] federal statutes and federal questions by the United States Courts.

VI

Petitioner further shows that he will file, in connection with this petition, briefs in support thereof, and that, for the reasons hereinabove set forth and amplified in briefs, a rehearing should be granted, and, finally, judgment of the First City Court should be reversed and set aside.

The premises considered, petitioner prays that, after due consideration a rehearing be granted in this case, and that, finally the judgment of the First City Court be avoided and reversed, and judgment rendered overruling the plea of prescription filed by defendant and appellee herein, and for all general and equitable relief.

(Sig.) Denegre, Leovy & Chaffe, Edward L. Gladney, Jr., Attys.

A true copy. H. J. Stansbury, Dy. Clerk. (Seal of Court of Appeals of the Parish of Orleans, State of Louisiana.)

New Orleans, La., Feby. 4/24.

[fol. 35] Bond on Appeal for $25—Omitted in printing

[fol. 36] First City Court, Parish of Orleans, Division "C"

[Title omitted]

Certificate of Clerk

State of Louisiana,
Parish of Orleans:

I, H. J. Stansbury, Chief Deputy Clerk of the Court of Appeal Parish of Orleans, State of Louisiana, do hereby certify that the within and foregoing pages contain a true and correct transcript of the pleadings and judgments in the above numbered and entitled case.

In testimony whereof, witness my hand and the impress of the official seal of the Court.

H. J. Stansbury, Chief Deputy Clerk, Court of Appeal, Parish of Orleans. (Seal of Court of Appeals of the Parish of Orleans, State of Louisiana.)

New Orleans, La., February 4th, 1924.

[fol. 37] Supreme Court, State of Louisiana

[Title omitted]

Judgment

Mr. Justice Overton:

In re James C. Davis, Director General of Railroads, &c., applying for certiorari, or writ of review, to the Court of Appeal Parish of Orleans, State of Louisiana.

Refused on the ground that the ruling of the Court of appeal is correct.

(Signed) W. O. (Signed) C. A. O'N. (Signed) H. F. B. (Signed) B. C. D. (Signed) P. L. (Signed) D. N. T.

St. Paul, J., concurs in refusal on ground that matter presents nothing requiring exercise of extraordinary jurisdiction of this court.

Land, J., dissents.

Rogers, J., dissents.

A true copy. (Signed) Paul E. Mortimer, Clerk.

Clerk's Office, New Orleans, November 19th, 1923.

A true copy. H. J. Stansbury, Dy. Clerk. (Seal of Court of Appeals of the Parish of Orleans, State of Louisiana.)

February 4th, 1924.

[fol. 38] SUPREME COURT OF THE UNITED STATES

[Title omitted]

On Petition for Writ of Certiorari to the Court of Appeal, Parish of Orleans, State of Louisiana

ORDER GRANTING PETITION FOR CERTIORARI—March 17, 1924

On consideration of the petition for a writ of certiorari herein to the Court of Appeal, Parish of Orleans, State of Louisiana, and of the argument of counsel thereupon had,

It is now here ordered by this Court that the said petition be, and the same is hereby, granted, the record already on file as an exhibit to the petition to stand as a return to the writ.

Office Supreme Court, U. S.
FILED
MAY 2 1924
WM. R. STANSBURY
CLERK

No. 819

In the Supreme Court of the United States

OCTOBER TERM, 1923

JAS. C. DAVIS, DIRECTOR GENERAL OF RAILROADS, AS AGENT OF THE UNITED STATES, PLAINTIFF IN ERROR

v.

CORONA COAL COMPANY, DEFENDANT IN ERROR

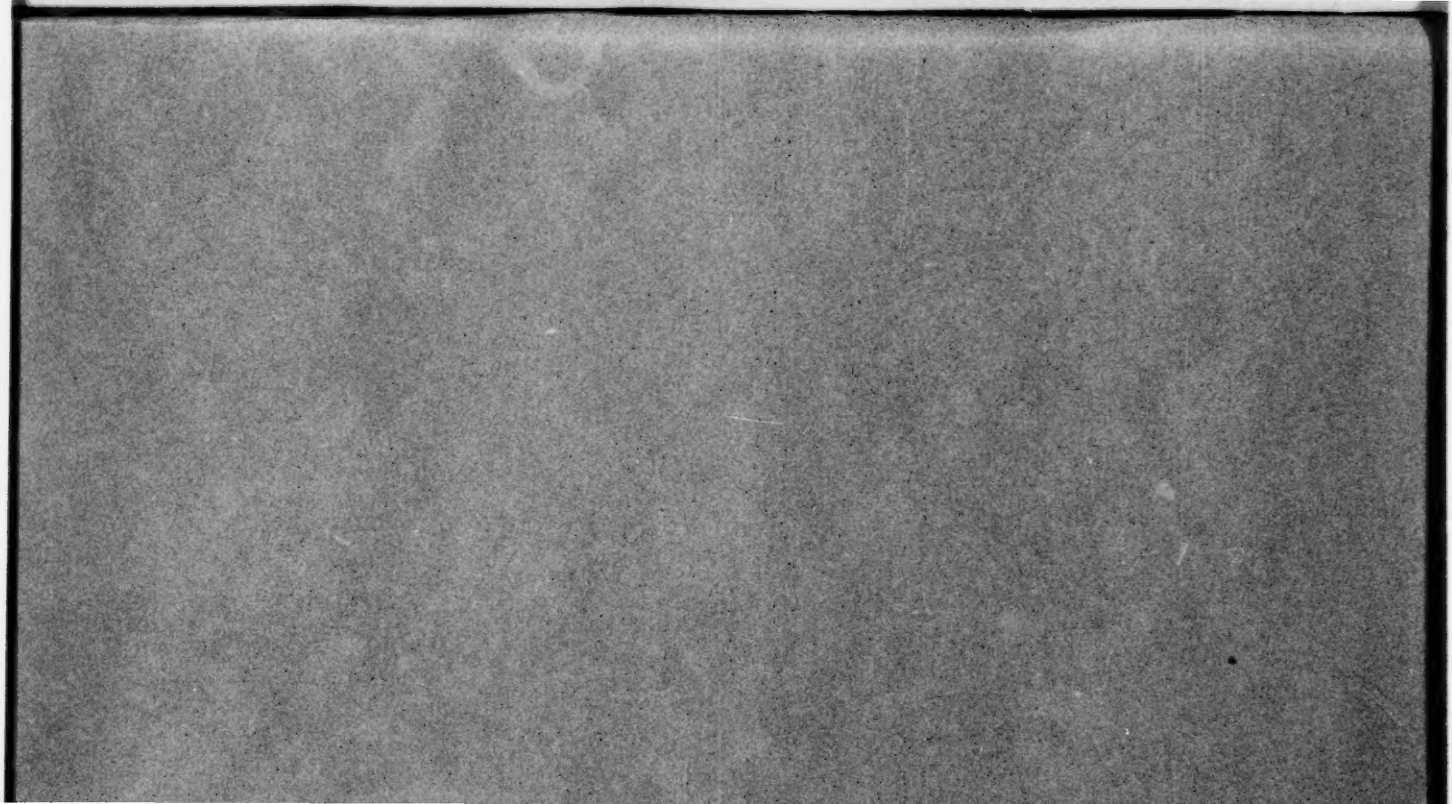
CERTIORARI TO THE COURT OF APPEAL FOR THE PARISH OF ORLEANS, STATE OF LOUISIANA

ORIGINAL BRIEF ON BEHALF OF PLAINTIFF IN ERROR

GEORGE DENÉGRE,
VICTOR LEOVY,
HENRY H. CHAFFE,
HARRY McCALL,
JAS. HY. BRUNS,
E. L. GLADNEY, Jr.,
Attorneys for Plaintiff in Error.

A. A. McLAUGHLIN,
General Solicitor,
United States Railroad Administration.
SIDNEY F. ANDREWS,
General Attorney,
United States Railroad Administration.

WASHINGTON : GOVERNMENT PRINTING OFFICE : 1924



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In the Supreme Court of the United States

OCTOBER TERM, 1923

JAS. C. DAVIS, DIRECTOR GENERAL OF Railroads, as agent of the United States, plaintiff in error,
v.
CORONA COAL COMPANY, DEFENDANT IN error.

No. 819

CERTIORARI TO THE COURT OF APPEAL FOR THE PARISH OF ORLEANS, STATE OF LOUISIANA

ORIGINAL BRIEF ON BEHALF OF PLAINTIFF IN ERROR

STATEMENT OF CASE

James C. Davis, Director General of Railroads, as Agent of the United States, on March 3, 1923, brought this suit in the First City Court of the City of New Orleans, State of Louisiana, for Two hundred and one dollars and eighty-three cents ($201.83) for damages alleged to have been sustained to a certain wharf in the City of New Orleans through the negligent operation of a tug belonging to the Corona Coal Company, defendant. The wharf in question belonged to the Morgan's Louisiana & Texas Railroad & Steamship Company, whose property, including the said wharf, was on the date of

the accident, January 9, 1920, being operated by the Director General of Railroads. (Petition Tr. pp. 14 et seq.)

The Corona Coal Company, appearing, pleaded, among other things, the Louisiana Statute of Limitations of one year applicable to tort actions (Exception Tr. pp. 19–20), which is embodied in Article 3536 of the Civil Code of that State and reads, in so far as relevant:

> The following actions are also prescribed by one year: That * * * resulting from offenses or quasi offenses.

This plea was on May 31, 1923, sustained by the trial court and the suit dismissed (Tr. p. 24). Davis thereupon took an appeal to the Court of Appeal for the Parish of Orleans, which after due hearing on October 1, 1923, affirmed the judgment of the First City Court (Tr. p. 28). An application for a rehearing was denied on October 15, 1923 (Tr. p. 28). The Supreme Court of the State of Louisiana, on November 17, 1923, refused to grant a writ of certiorari to the Court of Appeal. (Tr. p. 13.)

SPECIFICATION OF ERRORS

The sole issue which this writ presents is whether or not the agent appointed by the President under and by virtue of the Transportation Act of 1920 is subject to a State Statute of Limitations in prosecuting in a State Court a claim for the recovery of money due to the United States Railroad Administration, the specification of errors herein made being the action of the Court a qua in answering this question in the affirmative.

ARGUMENT

Our contention is that this suit is one on behalf of the United States in its sovereign capacity and that no limitation is applicable to the sovereign unless with its express consent, which has not been given.

We shall first develop the proposition that statutes of limitation do not run against the Government and then show that this immunity has not been waived in so far as the Railroad Administration is concerned.

I

The general foundation on which the doctrine contended for by us rests was stated one hundred years ago by Mr. Justice Story in *United States* v. *Kirkpatrick*, 9 Wheaton, 720, 735:

> The general principle is, that laches is not imputable to the Government; and this maxim is founded, not in the notion of extraordinary prerogative, but upon great public policy. The Government can transact its business only through its agents; and its fiscal operations are so various, and its agencies so numerous and scattered, that the utmost vigilance would not save the public from the most serious losses, if the doctrine of laches can be applied to its transactions. It would, in effect, work a repeal of all its securities.

The same view was expressed by this Court in *United States* v. *Nicholl*, 12 Wheaton, 505; *Gaussen* v. *United States*, 97 U. S. 584; and *Simmons* v. *Ogle*, 105 U. S. 271.

That the same considerations recognized by this Court as exempting the Government from the ordinary doctrine of laches have invariably been held applicable in connection with statutes of limitation is illustrated by the following language in *Gibson* v. *Chouteau*, 13 Wallace 92, 99:

> It is matter of common knowledge that statutes of limitation do not run against the State. That no laches can be imputed to the king, and that no time can bar his rights, was the maxim of the common law, and was founded on the principle of public policy, that as he was occupied with the cares of government he ought not to suffer from the negligence of his officers and servants. The principle is applicable to all governments, which must necessarily act through numerous agents, and is essential to a preservation of the interests and property of the public. It is upon this principle that in this country the statutes of a State prescribing periods within which rights must be prosecuted are not held to embrace the State itself, unless it is expressly designated or the mischiefs to be remedied are of such a nature that it must necessarily be included. As legislation of a State can only apply to persons and things over which the State has jurisdiction, the United States are also necessarily excluded from the operation of such statutes.

United States v. *Thompson*, 98 U. S. 486, involved the contention that the United States was subject to a State Statute of Limitations, in disposing of it Mr. Justice Swayne said:

> The United States not being named in the Statute of Minnesota are not within its provisions. It does not and can not "apply" to them. If it did, it would be beyond the power of the State to pass it, a gross usurpation, and void. It is not to be presumed that such was the intention of the State legislature in passing the act, as it certainly was not of Congress in enacting the law of 1789—*United States* v. *Hoar*, *Supra; Field* v. *United States*, 9 Pet. 182.
>
> * * * * *
>
> The exemption of the United States from suits, except as they themselves may provide, rests upon the same foundation as the rule of nullum tempus with respect to them. If the States can pass statutes of limitation binding upon the Federal Government, they can by like means make it suable within their respective jurisdictions. The evils of such a state of things are too obvious to require remark. P. 490.

A state statute of limitations being pleaded against the Government, this Court said in *United States* v. *Nashville C. & St. L. Ry. Co.*, 118 U. S. 120, 125:

> It is settled beyond doubt or controversy—upon the foundation of the great principle of public policy, applicable to all governments alike, which forbids that the public interests should be prejudiced by the negligence of the officers or agents to whose care they are confided—that the United States, asserting rights vested in them as a sovereign government, are not bound by any statute of limitations, unless Congress has clearly manifested its intention that they should be so bound.

This language was quoted with approval in *United States* v. *Insley*, 130 U. S. 263, 265–6. To the same effect is *Redfield* v. *Parks*, 132 U. S. 239, 243–4. Quite recently the same principle was reaffirmed in *United States* v. *Whited & Wheless*, 246 U. S. 552, wherein the necessity for "not a liberal, but a restrictive, a strict construction of such statutes when it has been urged to apply them to bar the rights of the Government" was pointed out (p. 561).

The latest decision of this Court, *E. I. Dupont de Nemours & Company* v. *James C. Davis*, handed down on April 7, 1924, is, we submit, conclusive on this point, as well as on all other points in the present case.

II

As stated in the *Dupont case*, supra, the only limitation embodied in Title II of the Transportation Act of 1920, 41 Stat. L. 456, is that found in Section 206 (a) "and it relates only to actions, suits, and proceedings brought against an agent to be designated by the President for that purpose, and fixes as the period of limitation that now prescribed by State or Federal statutes, but not later than two years from the passage of the Act. In this Title, thus specifically devoted to the subject of winding up matters arising out of Federal control, nothing is to be found which suggests any limitation of time within which actions, suits, or proceedings shall be brought to enforce liabilities arising out of Federal control, in favor of the United States."

The unsuccessful contention in the *Dupont case*, of course, was that the words "all actions at law by carriers subject to this Act for recovery of their charges, or any part thereof, shall be begun within three years from the time the cause of action accrues and not after," added to paragraph 3 of section 16 of the Interstate Commerce Act by section 424 of the Transportation Act applied to an action by the Federal Agent. In deciding that case this Court said:

> An action by the Director General to recover upon a liability arising out of such control is an action on behalf of the United States in its governmental capacity (*Ches. & Del. Canal Co.* v. *United States*, 250 U. S. 123, 126; in re Tidewater Coal Exchange, supra) and, therefore, is subject to no time limitation, in the absence of congressional enactment clearly imposing it. *United States* v. *Nashville, etc., Ry. Co.*, 118 U. S. 120, 125; *United States* v. *Whited and Wheless*, 246 U. S. 552, 561. Statutes of Limitation sought to be applied to bar rights of the Government must receive a strict construction in favor of the Government. *United States* v. *Whited and Wheless, supra.*

Beyond any question the *Dupont case* establishes the fact that the Transportation Act contains neither a limitation for actions by the Federal Agent nor a waiver of or consent to the application to such actions of any limitation, state or federal.

The act in which the Court a qua considered that it found a consent of the Government to being bound

by statutes of limitation is the Federal Control Act of March 21, 1918. (40 Stat. L. 451, as amended March 2, 1919, 40 Stat. L. 1920.)

The first paragraph of Section 10 of that act, which alone deals with actions by and against the Government in its new rôle of a common carrier, reads:

> That carriers while under Federal control shall be subject to all laws and liabilities as common carriers, whether arising under State or Federal laws or at common law, except in so far as may be inconsistent with the provisions of this Act or any other Act applicable to such Federal control or with any order of the President. Actions at law or suits in equity may be brought by and against such carriers and judgments rendered as now provided by law; and in any action at law or suit in equity against the carrier no defense shall be made thereto upon the gound that the carrier is an instrumentality or agency of the Federal Government. Nor shall any such carrier be entitled to have transferred to a Federal Court any action heretofore or hereafter instituted by or against it, which action was not so transferable prior to the Federal control of such carrier; and any action which has heretofore been so transferred because of such Federal control or of any act of Congress or official order or proclamation relating thereto shall upon motion of either party be retransferred to the Court in which it was originally instituted. But no process, mesne, or final shall be levied against any property under such Federal control.

The first sentence of this paragraph manifestly was designed to deal with the operation of the properties taken over by the Government rather than with the question of suits by or against the Director General. This very distinction is commented on in the latter part of the opinion in the *Dupont case*, and seems so clear as not to require further discussion. The succeeding words "Actions at law or suits in equity may be brought by and against such carriers and judgments rendered as now provided by law," had as their purpose the consent, on the one hand, of the Government to suits against it in matters growing out of its operation of the railroads, and, on the other hand, the grant of authority to the Director General to appear as a plaintiff in similar matters. Without this language persons suffering damage at the hands of the Railroad Administration would have been relegated to the Court of Claims for relief, and there might well have been question as to the authority of the Director General to bring suits in the ordinary way to protect and keep intact the vast properties entrusted to him.

That the clause last above quoted was not intended as a waiver of immunity in suits by the Government clearly appears from the words immediately following, "and in any action at law or suit in equity against the carrier no defense shall be made thereto upon the ground that the carrier is an instrumentality or agency of the Federal Government," which are an express waiver of certain of the attributes which ordinarily inhere in the sovereign, and were

recognized as not being surrendered by the immediately preceding general consent to the institution of suit; and it is significant that the privileges and immunities surrendered are only as to suits *against* the Government and not as to suits *by* it. Congress was evidently very particular not to limit the time within which the rights of the Government growing out of the federal operation of the railroads might be asserted in the Courts. This policy of the lawmaker was the same followed in the Transportation Act, wherein limitations were fixed for suits against the Government but none in actions on its behalf.

The remainder of the first paragraph of Section 10 deals solely with the removal of suits and the matter of execution, and requires no consideration in this connection.

The language of Section 10 not only fails to show the clear intention of Congress that State statutes of limitation should be applicable to suits brought by the Director General but, on the contrary, we think, clearly indicates the intention of Congress that such State statutes should not be applicable. This conclusion must, we think, be adopted when it is remembered that legislation in derogation of public right must receive a strict construction in favor of the United States. *U. S.* v. *Railway*, 247 U. S. 210–313. The same thought is expressed in *U. S.* v. *Whited & Wheless*, 246 U. S. 552–561, where it is said:

> Fundamental to the interpretation of the statute which the answering of the question renders necessary, lies the rule of law settled

> "as a great principle of public policy," that the "United States, asserting rights vested in them as a sovereign Government, are not bound by any statute of limitations, unless Congress has clearly manifested its intention that they shall be so bound." * * * and also the fact that this principle has been accepted by this court as requiring not a liberal, but a restrictive, a strict construction of such statutes, when it has been urged to apply them to bar the rights of the Government.

In the recent case of *DuPont de Nemours* v. *Davis*, Director General, decided April 7, 1924, the same thought is expressed in the following language:

> In taking over and operating the railroad systems of the country the United States did so in its sovereign capacity, as a war measure, "under a right in the nature of eminent domain." * * * and it may not be held to have waived any sovereign right or privilege unless plainly so provided. * * * An action by the Director General to recover upon a liability arising out of such control is an action on behalf of the United States in its Governmental capacity * * * and, therefore, is subject to no time limitation, in the absence of Congressional enactment clearly imposing it. * * * Statutes of limitation sought to be applied to bar rights of the Government must receive a strict construction in favor of the Government.

In view of the requirement that the language of the statute be liberally construed in favor of the United

States to prevent the derogation of public right, and in view of the failure of the language used by Congress to indicate by the remotest possibility any purpose of Congress to waive the immunity of the sovereign from the effect of State statutes of limitation, such State statutes must be held to have no application to suits brought by the Director General in behalf of the Government.

The opinion of the Court of Appeal for the Parish of Orleans, which will be found at p. 28 et seq. of the Transcript (being in fact the opinion of the same Court in a somewhat similar case, handed down on the same day and adopted in this case), rests, as we have said, on the proposition that section 10 of the Federal Control Act consents to the applicability of state statutes of limitation to actions on behalf of the Railroad Administration; a proposition which we have herein above shown to be erroneous.

The doctrine propounded by that court in the same opinion that where there is a state, as well as a federal, limitation on the same general subject the state statute is to be applied by the State Courts and the Federal statute by the Federal Courts seems to require no discussion, as the question in this case is whether the United States waived its immunity from suit, a question upon which State statutes could have no bearing, no matter in what court a suit might be brought.

CONCLUSION

There can be no doubt that the general rule is that when the United States appears in Court as a plaintiff it is not bound by any statute of limitations, and that Davis, the Federal Agent, is suing on behalf of the United States in its sovereign capacity. The only exception to this rule exists when the United States gives its express consent to the application of statutes of limitation to it; and in so far as the Railroad Administration, acting through either the Director General or the Federal Agent, is concerned, Congress has not waived the ordinary immunity from the operation of statutes of limitation, state or federal.

There is, therefore, error in the judgment of the Court of Appeal for the Parish of Orleans, and we pray that it be reversed.

Respectfully submitted.

GEORGE DENÉGRE,
VICTOR LEOVY,
HENRY H. CHAFFE,
HARRY MCCALL,
JAS. HY. BRUNS,
E. L. GLADNEY, Jr.,
Attorneys for Plaintiff in Error.

A. A. MCLAUGHLIN,
General Solicitor,
United States Railroad Administration.

SIDNEY F. ANDREWS,
General Attorney,
United States Railroad Administration.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1923.

No. 819

JAMES C. DAVIS, DIRECTOR GENERAL OF RAILROADS, AS AGENT OF THE UNITED STATES, PETITIONER,

vs.

KOPPERS COAL COMPANY.

On Writ of Certiorari to the Court of Appeal of the Parish of Orleans of the State of Louisiana.

BRIEF FOR RESPONDENT.

NICHOLAS E. MONTGOMERY,
Attorney for Respondent.

April, 1924.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1923.

No. 819

JAMES C. DAVIS, DIRECTOR GENERAL OF RAILROADS, AS AGENT OF THE UNITED STATES, PETITIONER,

versus

CORONA COAL COMPANY.

On Writ of Certiorari to the Court of Appeal of the Parish of Orleans of the State of Louisiana.

BRIEF FOR APPELLEE.

This is a suit for only $201.83. The proportionate expense of these appeals, possible only to the Government,

and the fact that to have a lawyer argue this case in the Supreme Court of the United States would cause the Corona Coal Company to lose a sum of money greater than the claim if the suit be won, force the defendant and appellee to submit this matter on brief.

STATEMENT OF THE CASE.

This action is for damages claimed to have been caused the wharf, owned and used by the Morgan's Louisiana and Texas Railroad and Steamship Company at the time when said railroad was under the control of the United States Government, acting through the Director General of Railroads, by the tugboat of the defendant. The claimed collision causing the damages was on January 9, **1920,** but suit was not brought until March 3, **1923**—over three (3) years after the damages are claimed to have arisen. Under the law of Louisiana claims of this kind must be sued on within one (1) year, otherwise they are prescribed. Prescription was pleaded in this case and was sustained by the lower Court and by the Court of Appeal and by the Supreme Court.

If this plea of prescription is not maintained then it means that the Government, **engaged in business,** can 5, 8, 10 or 20 years after a claimed act of negligence, when witnesses are all scattered or dead, file suit for recovery—a most unfair, unjust and reprehensible act and contention. It is to be remembered that this suit is brought in the Courts of Louisiana and its Courts are not bound to follow any rules or decisions peculiar to the Courts of the United

States. And it is to be remembered that this cause of action has not arisen out of governmental functions, but out of the running of the railroads **temporarily** as a business.

REASONS FOR JUDGMENT OF THE FIRST CITY COURT, PARISH OF ORLEANS.

"It is argued that this is a suit by the United States Government on a claim due the Government and that, therefore, no prescription applies; that if any prescription be applicable it is prescription allowed by Federal Statute, and not the prescription provided by State law.

"By Sec. 10 of the Federal Control Act it is enacted: 'That carriers while under Federal control shall be subject to all laws and liabilities as common carriers, whether arising under State or Federal laws or at common law, except in so far as may be inconsistent with the provisions of this Act or any other Act applicable to such Federal control or with any order of the President. Actions at law or suits in equity may be brought by and against such carriers and judgments rendered as now provided by law; and in any action at law or suit in equity against the carrier, no defense shall be made thereto upon the ground that the carrier is an instrumentality or agency of the Federal Government.'

"Section 424 of the Transportation Act contains this language: 'All actions at law by carriers subject to this Act for recovery of their charges, or any part thereof, shall be begun within three years from the time the cause of action accrues, and not after.'

(Fol. 24.) "It is evident from the language of this section of the Statutes that the Federal Government

waived the imprescriptibility now asserted. Contention is made that as the Federal Government or its representative, the Director General, is not mentioned in the prescription provisions of the section cited from the Transportation Act, the Federal Government or its representative, the Director General, is not bound thereby.

"The comprehensive significance of the word 'carrier' as recognized by the United States Supreme Court in the case of Missouri Pac. R. R. Co., et al., v. Ault, 256 U. S., pp. 554, *et seq.*, attaches to the word 'carriers' as used in the section cited from Transportation Act. The plea of imprescriptibility is inapplicable.

"The remaining question is, which prescription, Federal or State, is to control. The power granted to Congress by the Federal Constitution to regulate commerce among the several States, is not a power to regulate the Courts of the several States; Congress may give its directions to Courts of its own creation, but when the Federal Government, through its representatives, voluntarily invokes the aid of the State Court, the State law, as to prescription, prevails.

"The exception that the claim herein is prescribed by the State Statute should be maintained." (Tr., pp. 14, 15.)

OPINION OF THE COURT OF APPEAL, PARISH OF ORLEANS.

"It is argued by counsel for plaintiff (1) that a suit by the Director General for the recovery of moneys derived from Federal control is an action by the United States suing in its sovereign capacity; (2) that unless the United States, through the Congress, consents to a statute of limitation, it is not affected by such a

statute; (3) that the United States has not in this instance given such consent. It is finally contended, in the alternative, that even if such consent had been given that the Act 223 of 1914 is not controlling as against the United States, and that if the Government is amenable to any statute of limitation of actions of this nature, it is only subject to the provisions of Section 424 of the Transportation Act of 1920 (41 Stat. L., 492), restricting the time in which suit may be filed to three years, and not two years, as provided under the State statute. The Federal statutes, Sec. 424, is an amendment to the Interstate Commerce Act, and reads in part as follows:

"'* * * all actions at law by carriers subject to this Act for recovery of freight charges, or any part thereof, shall be begun within three years from the time the cause of action accrued, and not after.'

"It is not disputed, nor is there room for doubt, under the ruling in Northern Pacific Railroad Co. v. North Dakota, Ex Rel. Langer (250 U. S., 135), that a suit by the Director General for the recovery of moneys derived from the Federal control is an action by the United States in its sovereign capacity.

"All other points of contention raised by the plaintiff are resolved into the dominant question whether the Federal Government when choosing the State, rather than the Federal Court, in which to litigate its rights, is amenable to State statute, barring only the remedy and (fol. 29) not destroying the cause or right of action. See the case of Pearl Wight v. Zemurray, No. 8057, Orleans Appeal, rendered November 14, 1921, Campbell v. City of Haverhill, 155 U. S., 610—Angell on Limitations, 6th Ed., pp. 56, *et seq.*

"It is manifestly unsound for plaintiff to contend, as was recently held in Davis v. Dupont De Nemours

(287 Fed., 522), that the Federal Government, in exercising its sovereign power under the Transportation Act, has not clearly given its consent to be included or treated as within the statutes of limitation of action applicable to other litigants. The language of Sec. 424 of the Act (41 Stat. L., 492), as above quoted, in our opinion, completely destroys such contention, we are unable to subscribe to the conclusions found in Davis v. Dupont, especially in the light of the broad meaning given to the term 'carriers' as expounded in Missouri Pac. R. R. Co., et al., v. Ault (256 U. S., 554), and cited in the reasons for judgment of the learned Judge from whose Court this appeal is taken. It is an inevitable conclusion that an action of this nature if brought in the Federal Courts would involve estoppel against the Government's denial, even in its most sovereign aspect, of intention, under Sec. 424 to be amenable to the limitations of action therein expressly provided. Were the present litigants before the Federal Court in this matter, it might be properly contended, under highest Federal authority, that there is no bar to the action brought within three years and that the State statute (Act 223 of 1914) is suspended by the Federal Act, and hence altogether unavailable as a defense to the defendant in this case if before the Federal Tribunal.

"In the case of United States v. Hoar, 2 Maaon (Cir. Ct.), 312, where an administrator of an estate pleaded the statute of limitation of Massachusetts in bar of an action in assumpsit brought by the United States for money had and received, the Court, through Justice Story, held the plea not good as against the Government when urged in the (fol. 30) Federal Court. It was there said:

" 'The only point, which has been argued here, is whether the United States are barred of their suit by

the statutes of limitation of Massachusetts above pleaded. It has not been denied, and indeed is too plain for argument, that the statutes of limitation of Massachusetts cannot *proprio vigore* bind or bar the statutes of the National Government. If such an effect can only be by reason of some extension of time for this purpose by the National Legislature.'

"In Ches. & Del. Canal Co. v. U. S. (250 U. S., 123), Mr. Justice Clark stated the rule to be:

" 'That the United States is not bound by State statutes of limitation is settled with equal definiteness in U. S. v. N. C. & St. L. Ry. Co., 118 U. S., 120; U. S. v. Whited & Wheles, 246 U. S., 552, 561.'

"Although by the foregoing and like authorities we find this doctrine plead with almost perfect uniformity, it should be noted that the rule announced only in its application to Federal suits in Federal Courts. We feel justified in holding that this rule cannot bind the State Courts where the *lex fori* prevails and should prevail, particularly against a litigant having a choice of forms, and where the plea of prescription in whatever form it may be urged, affects only the remedy and not the right of the litigants. (25 Cyc., 1008, also 1018.)

"We are entirely in accord with defendant's contention that the Congress clearly intended to subject the Government while in control of common carriers under this emergency litigation, to State laws and liabilities not inconsistent with Federal control. This is too plainly set out in the Federal Control Act (40 Stat. L., 451) to require judicial interpretation. Section 10 of that Act reads as follows:

" 'By Sec. 10 of the Federal Control Act it is enacted: That carriers, while under the Federal control, shall be subject to all laws and liabilities as common

carriers, whether arising under State or Federal laws or at common law, except in so far as may be inconsistent with the provisions of this Act or any other Act applicable to such Federal control or with any order of the President. Actions at law or (fol. 31) suits in equity may be brought by and against such carriers and judgments rendered as now provided by law; and in any action at law or suit in equity against the carrier, no defense shall be made thereto upon the ground that the carrier is an instrumentality or agency of the Federal Government.'

"The last clause of the foregoing section taken with that which precedes it, clearly pronounces against such argument as is herein advanced to the effect that the carrier is an instrumentality or agency of the Federal Government, against which statutes of limitation, particularly those of the State, shall not apply.

"Sec. 206 of the Transportation Act provides for limitations of actions brought against carriers on citation of an agent designated by the President, and that the period of limitation prescribed by either State or Federal statutes (not exceeding, however, two years from the date of passage of the Act) may be brought in any Court which but for Federal control would have ordinarily had jurisdiction. A like provision under Sec. 424 is made for all actions at law by carriers within prescriptive period of three years from the time the action accrues. These two sections, therefore, plainly evidence the intention of Congress that the Federal Government while representing all carriers, within the purview of the Transportation Act, is to be protected while defending timely action, or barred while prosecuting untimely actions, in State and Fed-

eral Courts arising from and after the termination of Federal control.

"We find no merit in plaintiff's contention that Sec. 10 of the Federal Control Act was expressly repealed by the Transportation Act of March 1, 1920 (41 Stat. L., 456). While Sec. 200 (a) of the latter Act provides that Federal control shall terminate at 10:01 A. M., March 1, 1920, it is also stipulated in Sec. 202 of the same Act (fol. 32): 'The President shall, as soon as practicable, adjust, settle, liquidate and wind up * * * all questions and disputes of whatever nature arising out of or incidental to Federal control.'

"To charge the President or his appointed agent with the duty of liquidating all matters arising from Federal control and to provide at the same time that, in the subsequent prosecution of this duty, the Government, its President or agent, shall be given greater rights or remedies than those existing during the Federal control, would be a denial of rights expressly reserved to all parties within the purview of the previous Act.

"We find no error in the judgment of the trial Court, and same is, therefore, affirmed at plaintiff's costs in both Courts."

This judgment, pages 17, 18, 19, 20 and 21 of the transcript, was found correct by the Supreme Court of Louisiana, transcript 23.

I.

In Louisiana the Forum governs prescription even on judgment of another State. *4 La. An., 235, Brown v. Stone; 7 La. An., 272, Taylor v. Hadden.*

II.

The Supreme Court of Louisiana has found no distinction as to prescription for torts between public ministerial officers and private individuals, saying:

> "Applying this test to the plaintiff's petition, it is apparent that the alleged responsibility of the State Treasurer is for an offense or quasi-offense, and that the damages resulting therefrom are necessarily *ex delicto*, and the action, therefore, is prescribed in one year. Civil Code, Art. 3501, new No. 3536. It must be observed that Dubclet was to receive only money—to be raised by taxation, says the Act—and he did not receive money, but bonds, and his act was, therefore, unlawful, and the rule applies to ministerial officers as well as to individuals. This Court said in Semple v. Buhlet, 6 Mart. (N. S.), 665, the law makes no distinction in this respect between public ministerial officers and private individuals, and we ought not to distinguish and, were we at liberty to do so, it would be difficult to find any good reason for imposing a heavier responsibility on a public than a private agent. And this was reiterated in Edwards v. Turner, 6 Rob., 382; Emmerling v. Graham, 14 An., 389; Taylor v. Graham, 15 An., 418. **31 La., 567, Suit of New Orleans v. Southern Bank.**"

III.

Where a Government goes into business in concert or in competition with her citizens, or **where the mischiefs to be remedied** are of such a nature that the State must be necessarily included, the statutes of limitations do run against said Government.

"Limitations do not, as a general rule, run against the sovereign of Governor, whether State or Federal, but the rule is otherwise whether the mischiefs to be remedied are of such a nature that the State must necessarily be included, or whether the State goes into business in concert or in competition with her citizens. 25 Cyc., 1008; 45 Ark., 81, Calloway v. Cossart, 13 Wall., 92, Gibson v. Chuteau.

"It is obvious that all these were plain business transactions after the grant of the original franchises. The attitude of the State with regard to this property, or her rights of indemnity in it, was just such as might have been assumed by any individual or private corporation, which might have chosen to lend its credit to the bank. When a State steps down into the arena of common business in concert, or in competition with her citizens, she goes divested of her sovereignty. The reason of the maxim, '*Nullum tempus occurrit regi*,' no longer applies. U. S. Bank v. McKenzie, 2 Brook (C. J. Marshall's Dec.), 393; U. S. v. White, 2 Hill, N. Y., 59; Fields v. Wheatly, 1 Sneed, 351; Bank of Tenn. v. Dibrell, 3 Sneed, 379; Bank of U. S. v. Planters' Bank of Ga., 9 Wheaton, 904; Angell on Lim., 6 Ed., Sec. 41." *45 Ark. Rep., 88, Calloway v. Cossart.*

IV.

The very law itself, providing for the taking over of the railroads temporarily by the Government, undoubtedly intended the railroads to run as private business and that the Government should not take advantage of its position as a Government to advantage it in its running of the railroads in dealings with individuals. And in this case the defendant was engaged in the business of the railroad—

that is in landing and removing steamships to load or deliver railroad freight at its own wharf. This railroad is what is known as the Southern Pacific. This branch is called the Morgan's Louisiana and Texas Railroad & **Steamship** Company.

The Act of August 29, 1918, Ch. 418, Section 10, reported in the Federal Statutes Annotated, Supplement, 1918, p. 746, provides:

(1) That carriers, while under Federal control, are subject to all laws and **liabilities** as common carriers—except (and this is the only exception) inconsistent with this Act or any other Act applicable to such Federal control or with order of the President. This is the only exception, and there is no law or order to the contrary.

(2) That actions at law and suits in equity may be brought **by** and **against** such carriers, and judgments rendered as now provided by **law.**

(3) That in any action at law or suit in equity against the carrier "no defense shall be made thereto upon the ground that the carrier is an instrumentality or agency of the Federal Government."

This certainly means that the Government is to be in the place of the private owner of the railroad and subject to all existing laws governing the business relations of the railroads and subject to the same suits and judgments. And it means that in all actions for or against the carrier—

the carrier cannot use the defense that it is an instrumentality or agency of the Government, and this would cover the defense to a plea of prescription. The Government, in taking over the railroads, intended that they should be governed by the laws exactly as when run by private individuals, and it was not intended that the people dealing with the railroads should in one particular alone—and that a most unfair and unjust particular—be met with the defense that the railroad is an agency of the Government in the case of a plea of prescription. It seems to me that the injustice and damage done to people doing business with the railroads is such that prescription or the statute of limitation must of necessity run in their favor and that this necessity was considered when in the statute it expressly stated that all existing laws and actions were to govern and that no defense that the carrier was a Government agency or instrumentality was to be or could be made. If this reasonable right and protection is to be read out of the law in order to give the Government now the unjust right to bring suits for damages whenever they please, then in so doing one would seem to suggest that the Government was following what Aristotle held to be the tendencies in constitutional development through wisdom and wealth, thence to numbers and thence to tyranny.

Matters of taxation, matters essentially governmental have no bearing on this case. This is a suit covering a business proposition and so, when the law is as specific as it is, to hold that in cases of this kind the Government could plead that the railroad administration was an in-

strumentality or agency of the Federal Government would be to read into the law an iniquity which the lawmakers never intended.

V.

As stated by Judge Renshaw:

> "The remaining question is, which prescription, Federal or State, is to control. The power granted to Congress by the Federal Constitution to regulate commerce among the several States is not a power to regulate the Courts of the several States; Congress may give its directions to Courts of its own creation, but when the Federal Government, through its representatives, voluntarily invokes the aid of the State Court, the State law, as to prescription, prevails." (Tr., 15.)

We respectfully ask that the judgment of the three Courts of the State of Louisiana be held correct, and that this writ of *certiorari* be dismissed.

Respectfully submitted,

RICHARD B. MONTGOMERY,
Attorney for Appellee.

Mr. Harry McCall, with whom *Mr. George Denégre, Mr. Victor Leovy, Mr. Henry H. Chaffe, Mr. Jas. Hy. Bruns, Mr. E. L. Gladney, Jr., Mr. A. A. McLaughlin* and *Mr. Sidney F. Andrews* were on the brief, for petitioner.

Mr. Richard B. Montgomery, for respondent, submitted.

In Louisiana, the forum governs prescription, even on a judgment of another State. *Brown* v. *Stone*, 4 La. Ann. 235; *Taylor* v. *Hadden*, 7 La. Ann. 272.

The Supreme Court of Louisiana has found no distinction, as to prescription for torts, between public ministerial officers and private individuals. *New Orleans* v. *Southern Bank*, 31 La. 567.

Where a government goes into business in concert, or in competition, with its citizens, or where the mischiefs to be remedied are of such a nature that the State must be necessarily included, the statutes of limitations run against the government. *Calloway* v. *Cossart*, 45 Ark. 88.

The law providing for the taking over of the railroads temporarily by the Government undoubtedly intended the railroads to run as private business and that the Government should not take advantage of its position as a Government to advantage it in dealings with individuals. And in this case the defendant was engaged in the business of the railroad—that is, in landing and removing steamships to load or deliver railroad freight at its own wharf.

The Act of March 21, 1918, c. 25, § 10, 40 Stat. 451, provides: (1) That carriers, while under federal control, are subject to all laws and liabilities as common carriers, except (and this is the only exception) those inconsistent with the act or any other act applicable to federal control or with any order of the President. (2) That actions at law and suits in equity may be brought by and against such carriers and judgments rendered as now provided by

law. (3) That in any action at law or suit in equity against the carrier "no defense shall be made thereto upon the ground that the carrier is an instrumentality or agency of the Federal Government."

This certainly means that the Government is to be in the place of the private owner of the railroad and subject to all existing laws governing the business relations of the railroads, and subject to the same suits and judgments. And it means that, in all actions for or against the carrier, the carrier cannot use the defense that it is an instrumentality or agency of the Government; and this would cover the defense to a plea of prescription. The Government, in taking over the railroads, intended that they should be governed by the laws exactly as when run by private individuals, and it was not intended that the people dealing with the railroads should in one particular alone—and that a most unfair and unjust particular—be met with the defense that the railroad is an agency of the Government, in the case of a plea of prescription.

Matters of taxation, matters essentially governmental, have no bearing on this case.

When the Federal Government, through its representatives, voluntarily invokes the aid of the state court, the state law, as to prescription, not the federal law, prevails.

MR. JUSTICE HOLMES delivered the opinion of the Court.

On March 3, 1923, the Director General of Railroads sued the respondent Coal Company in a City Court of New Orleans, for damages done by it to a railroad wharf on January 9, 1920, while the wharf was under federal control. The Coal Company pleaded the prescription of one year under the statutes of Louisiana. Civil Code, Art. 3536. This defence was upheld by the City Court and by the Court of Appeal and a review was denied by the Supreme Court on the ground that the ruling below

was correct. A writ of certiorari was granted by this Court.

In *Dupont De Nemours & Co.* v. *Davis*, 264 U. S. 456, it was held that the Director General was not barred by the statutes of the United States in an action on behalf of the United States in its governmental capacity to recover upon a liability arising out of his control. The familiar rule was repeated that the United States should not be held to have waived any sovereign right or privilege unless it was plainly so provided. The reasoning of that case excludes the notion that there was any intentional waiver by the United States of its sovereign right to collect its claims, irrespective of any statute, "as soon as practicable." The provisions of § 10 of the Federal Control Act of March 21, 1918, c. 25, 40 Stat. 451, 456, subjecting carriers "to all laws and liabilities as common carriers, whether arising under State or Federal laws or at common law, except" &c., rightly was said by the counsel for the petitioner to do no more than subject operations of the carriers to existing laws, not to adopt from the States their several limitations to suits that this Government might bring, while the United States applied no limitations of its own. The distinction in the statute between carriers and the Government is pointed out in the above cited case. Also it is established that a state statute of limitations cannot bar the United States, at least when a suit is brought in the United States courts. *United States* v. *Thompson*, 98 U. S. 486. *United States* v. *Nashville, Chattanooga & St. Louis Ry. Co.*, 118 U. S. 120. *Chesapeake & Delaware Canal Co.* v. *United States*, 250 U. S. 123, 125. The only question that requires a further word is whether the Courts below were right in thinking that the *lex fori* imposed a different rule if the United States saw fit to sue in a state court.

Perhaps it was not quite fully remembered that the laws of the United States are a part of the *lex fori* of a

State. But however that may be, it has been decided by a series of cases that when the courts of a State are given general jurisdiction over a certain class of controversies the power of the State over its own courts cannot be used to exclude a party from what otherwise is a constitutional right. *International Textbook Co.* v. *Pigg*, 217 U. S. 91, 111. *Kenney* v. *Supreme Lodge of the World*, 252 U. S. 411, 415. *Missouri ex rel. Burnes National Bank* v. *Duncan, ante*, 17. If the section of the Louisiana Code after the limitation that it expresses went on to say that the United States is forbidden to sue in the courts of the State upon such claims over a year old, although but for this limitation it might, the exception could not be maintained. But we hardly believe that if the matter were baldly presented the Code would be construed in that way. The ruling below was based upon the belief, since shown to be mistaken, that the United States had waived its immunity from the state laws.

Judgment reversed.

DAVIS, DIRECTOR GENERAL OF RAILROADS, AS AGENT OF THE UNITED STATES, *v.* CORONA COAL COMPANY.

CERTIORARI TO THE COURT OF APPEAL OF THE PARISH OF ORLEANS OF THE STATE OF LOUISIANA.

No. 819. Argued May 5, 1924.—Decided May 26, 1924.

An action by the Director General of Railroads, in a state court, to recover for damage done to a railroad wharf while it was under federal control, is not subject to the state statute of limitations. Cf. *Dupont De Nemours & Co.* v. *Davis*, 264 U. S. 456. P. 222.
Reversed.

CERTIORARI to a judgment of the Court of Appeal of the Parish of Orleans, Louisiana, (which the Supreme Court of the State declined to review,) sustaining the defense of prescription in an action for damages brought by the Director General of Railroads.